No. 21968

United States
Court of Appeals
for the Ninth Circuit

MICHAEL CLEMENT SWART,
Aka Michael Hastings, *Appellant,*

vs.

UNITED STATES OF AMERICA,
Appellee.

Upon Appeal from the Judgment of the United States District Court for the District of Oregon

BRIEF OF APPELLEE

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RULES INVOLVED

Rule 26, *Federal Rules of Criminal Procedure;*

In all trials the testimony of witnesses shall be taken act of Congress or by these rules. The admissibility of orally in open court, unless otherwise provided by an act of Congress or by these rules. The admissibility of evidence and the competency and privileges of witnesses shall be governed, except when an act of Congres or these rules otherwise provide, by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.

Rule 52, *Federal Rules of Criminal Procedure; Harmless Error*

(a) *Harmless Error.* Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

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COUNTER-STATEMENT OF THE CASE[1]

At approximately 3:00 P.M., on Friday, October 22, 1965, The St. Johns Branch of the Security National Bank of Oregon in Portland was robbed of $7,174.00 by a lone gunman (D. Br. 2; TR. 13, 15, 32-34, 46-47, 77-79).

[1] As used hereafter, "TR." denotes transcript of proceedings, "Govt. Ex." Government's exhibits at trial, and "D. Br." defendant's brief on appeal.

At the time of the robbery, the bank's deposits were insured by the Federal Deposit Insurance Corporation (D. Br. 2; TR. 11-12).

Two bank employees, teller Mrs. Judith Kay Lovall, and Mrs. Beverly Ridgeway, a bookkeeper, positively and unequivocally identified the defendant as the robber although subject to extensive cross-examination (TR. 32-34, 35-40, 77-81, 83) and although neither had seen his picture during the investigation of the case (TR. 37, 85).

Mrs. Lovall's identification was, in part, predicated on the fact that the defendant had previously entered the bank for a brief time between 12:00 and 1:00 P.M. on the day of the robbery (TR. 33-34, 36), a fact corroborated by Mr. Victor Nelson, the bank manager (TR. 12-13). She also noted in response to a question on cross-examination with respect to her identification: ". . . it's hard to forget a face once you have seen someone that has frightened you half to death."

Two other witnesses, Victor Nelson, the bank manager, and Gary Brush, a former teller, described the defendant as similar in appearance to the man who robbed the bank (TR. 20-21, 47) notwithstanding that at the time of the robbery the defendant wore a mustache and had long bushy hair, while at the trial

he was clean shaven and had a crew cut (TR. 23, 38, 39, 47).

In addition to a gun, the defendant also carried two shopping bags, one of which fell to the floor during the robbery where it was recovered by Mr. Nelson and subsequently turned over to the FBI (TR. 13-14, 25, 32-33, Govt. Ex. 3). This bag bore the trade label of a Cornet Store (Govt. Ex. 3).

As the defendant exited the bank, Mr. Brush followed him and recorded what he believed to be the license number of a car, described as a 1955 or 1956 blue over white Lincoln or Mercury, and used by the defendant to make his escape (TR. 48-50, 73). Aside from the letter "L", Mr. Brush had no independent recollection of the number recorded nor could his memory be refreshed from an examination of Government's Exhibit 11, described as pictures of a car identical to the escape vehicle (TR. 51-52; Govt. Ex. 11). He testified that after he turned the recording of the license number over to a person he believed to be an FBI agent, he never saw it again (D. Br. 2; TR. 53-54).

Special Agent Thomas E. Sheil, FBI, conducted an interview with Mr. Brush some twenty-five to forty-five minutes after the robbery (TR. 56, 58-59, 64), during which time Mr. Brush orally furnished the

license number of the escape vehicle (TR. 57-59). Agent Sheil's original notes of the interview were reduced to an official report which accurately reflected the number supplied by Mr. Brush (TR. 59). The memorandum made by Mr. Brush of the license number was apparently never given to any member of the FBI (TR. 57).

Over objection, Agent Sheil was permitted to testify the license number received from Mr. Brush was Oregon BL-4063 (TR. 64-65). Cross-examination by defense counsel again elicited the same number previously objected to on direct (TR. 67). Prior to the reception of such evidence, the Court admonished the jury that ". . . evidence of this type is so far removed or so many steps removed from the person who originally claimed to have noted the license plate, it is sometimes extremely unreliable. Whether or not this is or isn't will be ultimately for you to weigh and only you, but you should look at it with some degree of caution." (TR. 64).

Information identical to that obtained by Agent Sheil was similarly obtained from Mr. Brush by Detective Prescott Hutchens of the Portland Police Department. This information was orally conveyed some thirty minutes after the robbery and was incorporated into Detective Hutchen's investigative notes, which in turn became part of an official police report.

Over objection, Detective Hutchens was permitted to testify to the number obtained from Mr. Brush (D. Br. 3; TR. 71-73).

A license number identical to that obtained by Mr. Brush was also recorded by Miss Phillis B. Leach. On the afternoon of the robbery, Miss Leach was sitting in a car in front of the bank, when she observed a man carrying a shopping bag emerge from the bank, run to a car parked near by, and drive away (TR. 90-91). Although she recorded the number contemporaneously with the foregoing incident, she no longer had the recording at the time of trial and had no idea of its location or contents aside from the letters "BL" (TR. 92).

At approximately 6:00 P.M. the evening of October 22, 1965, Special Agent Leonard Frank, FBI, interviewed Miss Leach at her residence at which time she orally furnished the license number she had recorded earlier that day (TR. 97). This information subsequently became part of an official report of the FBI (TR. 98). Agent Frank was then permitted over objection to testify the license number furnished by Miss Leach was Oregon BL-4063 (TR. 99).

With respect to the original notation by Miss Leach, the FBI again had no information about this document (TR. 98).

At approximately 4:20 A.M., on October 23, 1965, a blue over white Lincoln bearing Oregon License plates 8L 4063 was recovered from the City Center Parking Service lot at S.W. 2nd and Washington Street in Portland. This vehicle had been checked in at the parking lot on October 22nd at 3:26 P.M. by an unknown man who informed the attendant he would return for it later that same night. (TR. 152, 158-159, 162-164; Govt. Ex. 11). The car had been reported stolen from the K & M Parking Lot on West Park in Portland between 8:00 p.m. on October 20, and 1:00 p.m., October 21, 1965, by Mrs. Minnie Albert (TR. 152-154; Govt. Ex. 11). It was subsequently determined that the drive from the St. Johns Branch of the Security Bank to the City Center Parking Service takes approximately fifteen minutes (TR. 124-127).

This car was processed for latent fingerprints by Special Agent James Benbrook, FBI (TR. 26-27, 164; Govt. Ex. 11). Certain rubber lifts of latent impressions obtained from the vehicle (TR. 27; Govt. Ex. 15) were compared with the known prints of the defendant (TR. 74-75; Govt. Ex. 16) and were found to be identical (TR. 186-188; Govt. Ex. 15, 16, 17(A)).

At approximately 9:00 P.M., on October 20, 1965, the defendant, under the name "Mike Hastings" regis-

tered at the Admiral Hotel in Portland, which is located diagonally across from the K & M Parking Lot (TR. 109, 111-112). Although his rent was paid through the 23rd, he checked out "in a hurry" on the evening of the 22nd without asking for or receiving a refund (TR. 111). He was identified by the hotel manager as having signed the name "Mike Hastings" on two room registration cards (TR. 108-111; Govt. Ex. 6, 7).

After leaving the Admiral, the defendant, still using the name "Mike Hastings," registered at the Danmore Hotel, 1217 S.W. Morrison, Portland, on the evening of October 22nd, checking out on October 24, 1965 (TR. 131-132; Govt. Ex. 8, 9).

After comparing the signature "Mike Hastings" appearing on the registration cards from the Admiral and Danmore Hotels (Govt. Exs. 6, 7, 9) with a letter admittedly written by the defendant (Govt. Ex. 10 and stipulation), Carl Lilja, the Government's Washington-based document examiner, concluded that the "Mike Hastings" signatures appearing on each of these three exhibits were authored by the same person who prepared Government's Exhibit 10 (TR. 173; Govt. Ex. 10-A, 10-B). Amplifying his answer on cross-examination, Mr. Lilja explained that based upon his reading, training and experience, there was nothing in the questioned or known writings to indi-

cate they could have been written by two different individuals (TR. 179).

On October 23rd, Special Agent Delbert Bielenberg, FBI, conducted a search of the first floor rest room of the Admiral Hotel finding, among other things, two brown shopping bags bearing the labels "Cornet Stores — ten cents," a business card from John Helmer's Clothing Store, bearing the name Ray Wheaton, and a cash register receipt from this same store (TR. 118-120; Govt. Ex. 4-A, 4-B, 5-A, 5-B).

Further investigation revealed that on October 22, 1965, Mrs. Doris Woolford, of the St. Johns Cornet Store, sold three shopping bags to an unknown man. These bags were identical in nature to Government's' Exhibit 3; the bag dropped by the defendant during the robbery (TR. 13-14, 102-103).

At approximately 6:30 P.M., on Friday, October 22nd, Mr. Ray Wheaton, a salesman for the John Helmer's Men's Store, 969 S. W. Broadway, Portland, sold the defendant $68.80 worth of clothing, including a sport coat, hat, sport shirt, and socks (TR. 138, 139, 141-142). During the course of the sale, the defendant told Mr. Wheaton he and his wife had won a sizeable quantity of money gambling in Las Vegas and of that sum he banked $1,000.00, gave his wife $500.00, and kept a portion of the remainder for

himself (TR. 139-140). Mr. Wheaton identified the cash register receipt (Govt. Ex. 5-B) found in the garbage can at the Admiral Hotel as the receipt from the foregoing transaction, and his business card (Govt. Ex. 5-A) also found in the Admiral Hotel rest room, as similar to the one he gave the defendant at the time of the sale (TR. 138-139, 141).

During the course of the trial, the Government produced twenty-six witnesses and offered some twenty exhibits, all of which were received with the exception of exhibit 13; the parking ticket from the City Center Parking Service found on Mrs. Albert's car at the time of recovery.

The trial commenced on April 11, 1967, and concluded on April 13, 1967. The jury returned a verdict of guilty and the defendant was committed to the custody of the Attorney General for a period of eighteen years with the stipulation that he was eligible for parole at the discretion of the Board of Parole.

ARGUMENT

I. THE TRIAL COURT DID NOT ERR IN ADMITTING HIGHLY RELEVANT AND MATERIAL EVIDENCE WITH RESPECT TO THE LICENSE NUMBER OF A VEHICLE USED BY THE ROBBER TO ESCAPE FROM THE SCENE OF THE CRIME.

A. THE TESTIMONY OBJECTED TO WAS NOT HEARSAY BUT WAS ADMISSIBLE UNDER THE THEORY OF PAST RECOLLECTION RECORDED.

Defendant urges the admission of testimony by FBI Agents Sheil and Frank and Portland Police Detective Hutchins with respect to the license number of the escape vehicle which had been communicated to them by witnesses Brush and Leach respectively was error (D. Br. 2-4, 11; TR. 48-50, 56, 58-59, 64-65, 71-73, 90-92, 98-99). The contention is without merit.

Defendant's characterization of such evidence as hearsay is inaccurate. The testimony was clearly admissible under the theory of past recollection recorded; a doctrine normally considered an exception to the hearsay rule.

Defendant's delineation of this type of evidence with the cliched canard of "hearsay" overlooks the massive range of evidence admitted under various exceptions to hearsay rule. Evidence, technically hearsay, has frequently been admitted under one or

more of the following exceptions: testimony of a former hearing, admissions against interest, spontaneous declarations, reputation evidence, boundaries, pedigree, recitals in ancient documents, business and Government records, public documents, handwriting and fingerprint exemplars, dying declarations, res gestae, and records of past recollection recorded; the theory relied upon by the Government in the case at bar. See generally: *McCormick on Evidence* (1954 Edition), The Hearsay Rule and Its Exceptions, and *Wigmore on Evidence* (3rd Edition, 1940), Exceptions to the Hearsay Rule, Sections 1420-1426, 1751 *et seq;* Title 28, Sections 1731-1736, United States Code; Rule 44, Federal Rules of Civil Procedure; Rule 15, Federal Rules of Criminal Procedure. The foregoing list is by no means intended to be all inclusive.

Hearsay evidence is generally defined as out of court statements, written or oral, not under oath or subject to cross examination and offered to prove the truth of the matter asserted. See: *McCormick on Evidence* (1954 Edition), Section 225; *Wharton's Criminal Evidence* (12th Edition, 1954), Section 249; *Wigmore On Evidence* (3rd Edition, 1940), Section 1395. The use of this type of evidence is in sharp contrast to the application of the doctrine of past recollection recorded which necessarily requires testimony that the witness have (1) no independent recollection of the facts in question, (2) that he pre-

pared a document or memorandum at the time the events were "fairly fresh" in his memory, (3) that neither the memorandum or any other stimulus can refresh his recollection, and (4) that at the time it was prepared, the memorandum was an accurate and complete record of what transpired. Only when the foregoing criterion are satisfied is the memorandum, document, or writing admissible as a record of past recollection recorded. See *State v. Benson,* 58 Wash. 2d 490, 364 Pac. 2nd 220, 223 (1961); *United States v. Riccardi,* 174 F. 2d 883 (3rd Cir., 1949), *cert. den.* 337 U.S. 941; *McCormick on Evidence* (1954 Edition), Section 276-277; *Wigmore on Evidence* (3rd Edition, 1940), Section 734.

In the instant case each of the above requirements was satisfied prior to the admission of the testimony objected to. Both Mr. Brush and Miss Leach, each of whom recorded the license number of the vehicle used by the defendant to make his escape, testified at the trial they had no independent recollection of the number (D. Br. 2; TR. 50, 92). Although the memoranda prepared by each of these witnesses contemporaneously with the defendant's escape were apparently lost, misplaced or destroyed prior to trial, the license number was orally communicated by the witnesses to Agents of the FBI and a member of the Portland Police Department (D. Br. 2; TR. 49-50, 53-54, 57, 91-92). FBI Agent Thomas Sheil and

Detective Prescott Hutchins conducted separate interviews with Mr. Brush within twenty-five to forty-five minutes of the robbery at which time he orally furnished the license number (TR. 53, 56-57, 64, 70-72). Although Mr. Brush believed he turned his memorandum containing the number over to an FBI Agent, the Bureau files contained no evidence of this document (D. Br. 2; TR. 53, 57). During a similar interview conducted by Agent Frank with Miss Leach at her home some three hours after the robbery, she also informed him of the license number. Agent Frank testified a search of the FBI files showed no record of Miss Leach's original memorandum even though the record is devoid of any evidence suggesting it ever left her possession (TR. 92, 98). The notes taken during the foregoing interviews were subsequently incorporated in official reports of the respective agencies (TR. 57-59, 71-72, 98-99). Agent Sheil also testified his report accurately reflected the information conveyed to him by Mr. Brush (TR. 59).

As a condition precedent to permitting each of the interviewing officers to read the license number of the vehicle from their reports, the trial Court carefully admonished the jury that,

> ". . . ladies and gentlemen, evidence of this type is so far removed or so many steps removed from the person who originally claimed to have noted the license plate, it is sometimes

> extremely unreliable. Whether or not this is or isn't will be ultimately for you to weigh and only you, but you should look at it with some degree of caution." (D. Br. 2-4; TR. 64)

There seems little doubt that if the original memoranda prepared by witnesses Brush and Leach and reflecting the license number had been preserved, each would have been admissible at the trial under doctrine of past recollection recorded. Why then should a record of this same transaction be rendered inadmissible merely because it is the product of two individuals?

In discussing this precise question, Prof. Wigmore concludes that where one person makes an oral statement of a particular transaction which is then recorded by a second individual reception of the memorandum supported by their joint testimony is proper and "in perfect accord with legal principle . . ." The discretion of the trial Court should control the admission of this type of evidence and "no ruling of admission should ever be deemed error worth noticing on appeal." *Wigmore on Evidence* (3rd Edition, 1940), Section 751, 755. Prof. Edmund M. Morgan is similarly in accord with the foregoing.

> "The problem is slightly more complex where the memorandum is the joint product of two or more persons. Witness W has ob-

> served the facts and reported them to witness X, who has made a record of them. Each swears to the accuracy of his own performance. On their combined oaths the memorandum is as fully verified as it either had both observed and recorded. The cross-examiner's' task, however, is made somewhat harder by this division of testimony. *Yet so long as a memorandum is produced which would have been admissible if made by the observer himself, reasonably adequate criteria of value are at hand for court and jury, and the contents of the writing should be received.*" (Emphasis added.)

The Relation Between Hearsay and Preserved Memory, 40 *Harvard Law Review* 712, 720 (1927). To the same effect see also: *McCormick on Evidence* (1954 Edition), Section 279.

Although there is a paucity of cases on the subject, those Courts which have addressed themselves to the question have generally rejected the characterization of hearsay and admitted evidence analogous to that offered in the instant case. In *Rathburn v. Brancatella*, 93 N.J.L. 222, 107 A. 279, 281 (1919), a question was raised concerning the ownership of a car involved in a personal injury action. One witness to the accident shouted the license number to another who recorded it on an envelope. The second witness also orally furnished the number to a police officer within ten to fifteen minutes of the accident. This

witness later destroyed the envelope assuming it was no longer of value. During the trial, an agent of the Department of Motor Vehicles identified the license number thus transmitted as the number of a car registered to the defendant. In affirming the conviction, the appellate Court rejected the contention that the testimony of the recording witness and the police officer was hearsay holding that

> ". . . where a witness testified that he made a correct report of a matter to another, at a certain time, but does not remember the exact facts reported, the testimony of the person to whom the report was made is admissible to show the facts reported."

To the same effect: *Chalmers v. Anthony,* 8 N.J.M. 775; 151 A. 549 (1930). See also: *Shear v. Van Dyke,* 17 N.Y. S. Ct. Rep. 528, 10 HUN 528 (1877).

The cases relied upon by defendant (D. Br. 11, 12, 13) in support of his position are inapposite and do little to support his resolution of the matter. It is significant to note that in *Neusbaum v. State,* erroneously cited as *State v. Newcomb* and on which defendant places heavy reliance, both the observing and recording witnesses were not called thus depriving the defendant of his right of confrontation and cross examination and the jury of its right to consider their testimony in the aggregate. It should also be noted that although the reviewing Court found the offending

testimony to be hearsay, it refused to reverse on this ground since the record failed to demonstrate any prejudice to the defendant. See citations of authority on this point under part "B".

In the instant case both of the observing witnesses (Brush and Leach), together with the recording witnesses (Sheil, Frank and Hutchens) testified and were thus fully subject to the rigors of cross examination. Herein lies the basic distinction between the evidence proffered by the Government and that denominated as hearsay; the former is subject to the strictures of cross examination, confrontation and observation, while the latter is not. See *Wigmore on Evidence* (3rd Edition, 1940), Sections 1362, 1395. This also seems to be the reasoning, at least in part, behind the promulgation of Rule 503(b) of the *Model Code of Evidence* which permits the admission of a hearsay declaration ". . . if the judge finds that the declarant . . . is present and subject to cross examination."

Hopefully the concept of common sense embodied in Rule 26, Federal Rules of Criminal Procedure, will obtain. The rule provides in pertinent part that:

> "The admissibility of evidence . . . shall be governed . . . by the principles of common law as they may be interpreted by the courts of the United States in the light of reason and experience."

The exigencies of the particular fact situation presented by this case as well as those of other crimes of violence frequently dictate that two or more persons must combine to produce a single element of evidence. So long as the traditional safeguards set forth above surrounding the admission of evidence under the doctrine of past recollection recorded are satisfied, no jury should be deprived of considering its evidential value in deciding the cause.

B. ADMISSION OF HEARSAY EVIDENCE DOES NOT REQUIRE REVERSAL

Even assuming *arguendo* the evidence respecting the license number was hearsay, the error, if such existed, did not contrive to deprive defendant of a fair trial; the admission being harmless within the ambit of Rule 52(a), Federal Rules of Criminal Procedure.

It is well settled that the admission of hearsay testimony does not per se require reversal. In determining if the defendant was prejudiced as a result thereof, the Courts consider the strength of the Government's case independent of the hearsay. *U.S. v. Press,* 336 F.2d 1003, 1013, (2nd Cir., 1963); *cert. den.* 379 U.S. 965; *U.S. v. Watkins,* 369 F.2d 170, 172 (7th Cir., 1967); *U.S. v. Cianchetti, et al,* 315 F.2d 584, 590 (2nd Cir., 1963). See also *Delli Paoli v. U.S.,* 352 U.S. 232, 236 (1957) and *Lutwak v. U.S.,* 344 U.S. 604, 619 (1953).

In reviewing the sufficiency of the evidence, it is similarly axiomatic that it must be viewed in the light most favorable to the Government including all reasonable inferences which may be drawn therefrom. *Glasser v. U.S.*, 315 U.S. 60, 80 (1941); *Miller v. U.S.*, 382 F.2d 583 (9th Cir., 1967); *Enriquez v. U.S.*, 338 F.2d 165, 166 (9th Cir., 1964) Cert. den. 380 U.S. 957.

In the case at bar, a plethora of evidence clearly confirmed the defendant's guilt without the aid of the alleged hearsay testimony. This evidence established that on the evening of October 20, 1965, the defendant, using the alias "Mike Hastings", checked into the Admiral Hotel in Portland (TR. 109, 111-112); that sometime between 12:00 and 1:00 P.M. on October 22, 1965, the day of the robbery he entered the St. Johns Branch of the Security National Bank of Oregon, briefly surveyed the premises, and departed; that he returned around 3:00 P.M. the same day armed with a gun and carrying two shopping bags; and that he robbed the bank of $7,174.00, escaping in a blue over white Lincoln or Mercury (D.Br. 2; TR. 11-12, 13-15, 25, 32-34, 35-40, 48-50, 73, 77-81, 83). During the course of the robbery, the defendant dropped one of the shopping bags (Govt. Ex. 3). bearing the trade name "Cornet Stores" (Tr. 13-14). This bag is identical to two other Cornet Store bags found in the first floor rest room garbage can of the

Admiral Hotel on October 23rd (TR. 118-120; Govt. Ex. 3, 4A, 4B). It was also determined that a total of three Cornet Store bags similar to the bag dropped by the defendant during the robbery were sold to an unknown man in a hurry on the afternoon of the robbery by a clerk at the St. Johns Cornet Store (TR. 13-14, 102-103; Govt. Ex. 3).

Following his successful escape from the bank, the defendant returned to the Admiral Hotel where, although his room rent was paid through the following day, he hurriedly checked out without asking for or receiving a refund. (TR. 108-111)

After his hasty exit from the Admiral, the defendant registered at the Danmore Hotel, in Portland, on the evening of October 22nd, again using the name "Mike Hastings".

On this same evening, the defendant savored the first fruits of the crime. At approximately 6:30 P.M., he purchased some $68.00 worth of clothing from Mr. Ray Wheaton, a salesman for the John Helmer's Men's Store in Portland. Apparently, in an ebullient mood, secure in the feeling that his surreptitious, clandestine activities has insulated him from discovery, he informed Mr. Wheaton that he and his wife had won a sizeable quantity of money gambling in Las Vegas. Of this money, the defendant stated he had banked

$1,000.00, given $500.00 to his wife, and kept a portion of the remainder for himself (TR. 139-141). During the course of the transaction, Mr. Wheaton gave the defendant his personalized business card. This item along with the cash register receipt for this sale and the two Cornet Store shopping bags, were also found in the garbage can in the Admiral Hotel rest room on October 23rd where they had apparently been secreted by the defendant prior to checking out on the evening of the 22nd (TR. 118-120, 138-141; Govt. Ex. 4A, 4B, 5A, 5B).

In addition to his identification by manager of the Admiral Hotel, the Government's handwriting expert conclusively established that the "Mike Hastings" signatures on the three registration cards from the two hotels were subscribed by the defendant. (TR. 108-111, 173, 179; Govt. Ex. 6, 7, 8, 10, 10-A, 10-B).

Defendant's guilt in the case at bar was based upon a veritable spate of evidence, direct and indirect, and completely unaffected by any testimony concerning the license number of the escape vehicle. It is patently apparent therefore, its admission inculpated no error affecting his substantial rights and did not serve to influence the verdict of the jury. The error, if any, was harmless. Rule 52(a), Federal Rules of Criminal Procedure; *Addison v. U.S.*, 317 F.2d 808, 816-817

(5th Cir., 1963); and *U.S. v. D'Antonio,* 362 F.2d 151, 155 (7th Cir., 1966). In *D'Antonio* the Court noted that

> "Unsubstantial error is not to be viewed in an attitude separated from reality and oblivious to the context of the record and as thus isolated relied upon to furnish the basis for reversal. Otherwise, a judgment which could be affirmed would be almost impossible to achieve."

Similarly, in the words of the Supreme Court,

> "We must guard against the magnification on appeal of instances which were of little importance in their setting." *Glasser v. U.S.,* 315 U.S. 60, 83 (1942).

Accordingly therefore, it is manifest appellant's guilt was ". . . found by a jury according to the procedure and standards appropriate for . . . trials in the Federal Courts" *Zamloch v. U.S.,* 193 F.2d 889, 894 (9th Cir., 1952).

CONCLUSION

WHEREFORE, on the basis of the above and foregoing, it is respectfully urged the judgment of conviction of the defendant be affirmed.

Respectfully submitted,

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